Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1980

NO. 80-153

ANN FLAHIFF HEADY - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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July 28, 1980

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed herein was mailed, postage prepaid on this 28th day of July, 1980, to:

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For the Sixth Circuit
Cincinnati, Ohio.

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IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1980

NO. _____

ANN FLAHIFF HEADY - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner, Ann Flahiff Heady, respectfully prays that a writ of certiorari issue to review the opinion and order of the U. S. Court of Appeals, Sixth Circuit rendered in this proceeding on May 7, 1980.

OPINIONS BELOW

The opinion and order of the U. S. Court of Appeals, Sixth Circuit Appendix A, pages 1 - 3 is not reported. The order denying petition for rehearing is in Appendix A at

Page 4. The Journal Entry of Judgment of the United States District Court for the Western District of Kentucky at Louisville is in Appendix A at pages 5 and 6.

JURISDICTION

The opinion and order of the U. S. Court of Appeals Sixth Circuit (Appendix A P.1-3) was entered on May 7, 1980. A timely Petition for Rehearing was denied on May 29, 1980 (Appendix A P.4). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the principles of collateral estoppel and double jeopardy barred a retrial of petitioner on Count 1 of the indictment.
2. Whether Petitioner was denied due process of law where trial court limited Petitioner on cross-examination of chief prosecuting witness.
3. Whether Petitioner was denied due process of law where the Trial Judge refused Petitioner's requested Instruction on her theory of defense.
4. Whether Petitioner was denied due process of law where Trial Court allowed improper prosecution argument.
5. Whether Petitioner was denied due process of law where Trial Court refused to permit Petitioner to Voir Dire jury.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution (Appendix A Page 7).

STATEMENT OF THE CASE

This is a criminal case in which the Petitioner was indicted and tried on two counts. Count 1 charged her with making false statements in CETA reports in violation of 18 U.S.C. 1001. Count 2 charged her with theft of CETA funds in violation of 18 U.S.C. 665.

Federal Jurisdiction of the trial court herein is based on 18 U.S.C. 3231.

Ann Heady, the Petitioner was employed in the Nelson County Judge Charles Roberts' office as his secretary. As such she did the paper work for the CETA program.

Judge Roberts was the signatory official for the CETA program in Nelson County. (T.E. P. 106).

The CETA program expanded from time to time and grew to the place that Ann needed help to do the work it required. (T.E. P.329).

Judge Roberts suggested that Ann's daughter,

Rhonda Heady, be employed to assist Ann. (T.E. Pages 330,331).

At the time of her employment Rhonda was a full time high school student.

Rhonda continued her education but was transferred by Judge Roberts to the status of a full time employee on the CETA program. (T.E. P.338)

During the entire time of Rhonda's employment Judge Roberts was her supervisor. (T.E. P.338)

Eventually Rhonda became a full time student at Eastern Kentucky State University in Richmond but continued on the CETA program as a full time employee.

The indictment against Ann Heady covered the period of time that Rhonda was a full time student at Richmond and on the CETA program basically from August of 1977 through spring of 1978.

Judge Roberts had certified all the time and attendance reports that were the basis of the charges against Mrs. Heady. (T.E. Pages 107,108)

Ann testified that Judge Roberts had directed her work (T.E. P.327) and had instructed her how the full and part time people were to be paid (T.E. P.334). He checked the papers and the computer sheets (T.E. P.341).

It was Judge Roberts who had insisted that Rhonda not work in his office at the Courthouse (T.E. P. 338-339).

There was substantial testimony that Judge Roberts knew that erroneous entries were being made (T.E. P.267,268).

Ann testified that her job and Rhonda's were done by Rhonda or a combination of the two (T.E. P.343).

Count 1 of the Indictment against Ann charged that she made "false, fictitious or fraudulent statements or representations." Count 2 charged that she "wilfully misapplied, stole and obtained, by fraud CETA money and funds."

These counts were tried before a jury in February of 1979 which returned a verdict of "not guilty" on Count 2 but was unable to reach a verdict on Count 1. This resulted in

the Court's Judgment of Acquittal on Count 2.

The United States proceeded to retry the defendant on Count 1.

At the commencement of the second trial the defendant requested that counsel be permitted to Voir Dire the jury, which was denied (T.E. P.5).

Judge Roberts testified that he trusted Mrs. Heady completely and knew nothing about what was going on (T.E. P.223,236,237).

This alleged trust was one of the major points of the United States' case against Mrs. Heady, (T.E. P.92 and 528) who testified that she was just doing what she had been instructed to do (T.E. P.334,335,336).

On cross-examination of Judge Roberts defense counsel sought to show that during the period of time covered by the indictments Roberts was involved in one controversy after another and involved in much litigation. The Court, however, would not let counsel inquire into these matters (T.E. P.92,93,252)

It is interesting to note that the jury asked the court questions which were concerned,

not with false statements to CETA, but with the money involved (T.E. P.465 and 466).

At the close of the evidence Mrs. Heady requested numerous instructions, four of which set forth her theory of defense. (T.E. P. 476, Appendix A P.11-14)

The court refused to give these requested instructions.

In his closing argument the prosecutor claimed that the defendant was the cause for the ruination and perversion of government program (T.E. P. 529 and 530) and pled for a verdict of guilty from the jury as the maker and enforcer of the law (T.E. P. 531 and 541).

The second trial led to a jury verdict of guilty on Count 1. The Court in sentencing Mrs. Heady (Appendix A P. 5 and 6) ordered her, as a condition of probation, to make restitution of the amount of $4,756.42 (Appendix A P.6).

On Appeal the U. S. Court of Appeals Sixth Circuit upheld the judgment of the Trial Court. On May 29, 1980 a timely filed Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. Whether the principles of collateral estoppel and double jeopardy barred a retrial of Petitioner on Count 1 of the indictment.

The appellant was indicted on two counts of violating Title 18 of the United States Code.

Counts 1 and 2 each alleged an offense which ultimately arose from the same activity, i.e., alleged falsification of CETA reports. Count 1, based on 18 U.S.C. 1001 charged that Mrs. Heady made "false, fictitious or fraudulent statements or representations." Count 2 based on 18 U.S.C. 665, charged that Mrs. Heady "wilfully misapplied, stole and obtained by fraud CETA money and funds."

These counts were tried before a jury in February of 1979 which returned a verdict of "not guilty" on Count 2 but was unable to reach a verdict on Count 1. This resulted in the Court's judgment of acquittal on Count 2(Appendix A P.1) and the retrial of Count 1.

Because the same ultimate fact, i.e., alleged falsification of CETA reports, esta-

blished the two separate charges the issue of collateral estoppel is raised.

This Court has defined the meaning of collateral estoppel as follows: "That when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit . . ." This Court endorsed the view that the constitutional guarantee against double jeopardy protects a man who has been acquitted from having to "run the gauntlet" a second time. United States v. Brown, 547 F.2d 438, at 441 (8th Circuit 1977).

The ultimate issue to be decided as to Count 1 was whether Mrs. Heady had made "false, fictitious or fraudulent statements" as to CETA time and attendance reports. This issue was determined by the jury at the first trial when it determined by a "not guilty" verdict as to Count 2 that the appellant did not obtain CETA money and funds by fraud.

Thus under the doctrine of U.S. v. Brown, the same issue of ultimate fact could not

have been fairly litigated between the same parties again. Mrs. Heady's constitutional guarantee against double jeopardy was violated when she was retried on Count 1 of the indictment, and she is entitled to have the Judgment entered against her on Count 1 reversed, and a Judgment of Acquittal entered in regard to that count.

It is significant while we are dealing with the question of ultimate fact, that the jury asked questions of the court which concerned, not false statements as to CETA time and attendance reports, but the money involved. (T.E. P. 465 and 466). These questions to the court showed that the jury had uppermost in their minds the question of who got the money? The jury's action suggests that their verdict of conviction was founded upon theft of CETA money, an issue which had previously been resolved in appellant's favor by the "not guilty" verdict as to Count 2 of the indictment.

Apparently the trial judge also had this question uppermost in his mind when he made it

a condition of Mrs. Heady's probation that she make restitution in the amount of $4,756.42. (Appendix A P.6).

The questions asked by the jury and the court's order of restitution are strong indications that the same ultimate issue was relitigated between ner and the United States in violation of her Fifth Amendment protection against double jeopardy.

II. Whether Petitioner was denied due process of law where Trial Court limited Petitioner on cross-examination of chief prosecuting witness.

On cross-examination of the chief prosecuring witness, Judge Charles Roberts, Mrs. Heady attempted to show that during the time covered by the indictments Judge Charles Roberts was involved in one controversy after another and was involved in much litigation. The court, however, would not permit Mrs. Heady to inquire into these matters. (T.E. P. 92,93 and 252).

Judge Roberts testified that he trusted Mrs. Heady completely and knew nothing about

what was going on (T.E. 223,236,237).

Indeed this alleged trust in Mrs. Heady was one of the prime thrusts of the United States' case against Mrs. Heady. (T.E. P. 92 and 528). Mrs. Heady maintained that she was doing what her employer, Judge Roberts, instructed her to do. (T.E. P. 334,335,336)

Had Mrs. Heady been permitted to inquire into the controversy and litigation surrounding Judge Roberts she could have demonstrated and the jury could have reasonably believed that a man such as Judge Roberts, beset on all sides by trouble, turmoil, and litigation was not blindly trusting anyone.

In the minds of the jury, the disclosure of this factual information could well have reflected on the credibility and trustworthiness of Roberts' testimony.

We concede that reasonable restriction of cross-examination is within the discretion of the court. However, when, as in this case, the trial court has denied cross-examination which is appropriate and the

"excluded questions have a bearing on credibility and on the commission by the accused of the act relied upon for a conviction" then the proper limits of discretion have been passed and there is prejudicial error and denial of due process of law. District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660 at 665.

In Alford v. United States, 282 U.S. 687 at 692, 75 L.Ed 624, 51 S.Ct. 218, wherein a federal conviction was reversed, the court said:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

While the court has judicial discretion, "this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony."

Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369 at 375.

Judge Roberts' testimony relating to his trust in Mrs. Heady was crucial in the government's case. Such testimony was subject to impeachment as to credibility and trustworthiness by showing that Judge Roberts was during the time covered by the indictment, embroiled in controversy, besieged on all sides and not trusting anybody. The trial court did deny Mrs. Heady the opportunity to pursue matters involving Judge Roberts' controversies in court cases during the time covered by the indictment and in so doing, denied her right to due process of law.

III. Whether Petitioner was denied due process of law where the Trial Judge refused Petitioner's Requested Instruction on her theory of defense.

Ann Heady testified that her superior, Judge Roberts, directed her work and told her what to put in the blanks and how people were to be paid. (T.E. P. 327&334)

The CETA program expanded from time to time and grew to the place that Mrs. Heady asked for help to do it. (T.E. P.329)

Ann testified that Judge Roberts suggested that her daughter, Rhonda Heady, be employed. (T.E. P.330 & 331)

Judge Roberts instructed Ann that full time people were to be paid for eight hours a day five days a week and part time employees were to be paid for four hours a day. (T.E. P.334)

It was Judge Roberts who did not want Rhonda working in the office at the Courthouse. Judge Roberts transferred Rhonda to full time status. Judge Roberts was Rhonda's direct supervisor during the entire term of her employment. (T.E. P.338)

Ann testified that Judge Roberts did check the papers and the computer sheets. (T.E. P.341) She stated that both her job and Rhonda's were worked by either Rhonda or a combination of the two of them. (T.E. P.343)

The testimony set forth above constituted

Mrs. Heady's theory of defense.

It is the defense's theory that Mrs. Heady was acting only in a clerical or agency capacity and was duly following the directions and instructions of Judge Roberts who was not only Mrs. Heady's boss but the signatory official for the CETA program in Nelson County (T.E. 106). It was Charles Roberts who signed all the time and attendance reports which gave rise to these charges against Ann Heady (T.E. P. 107,108).

The defense had requested instructions no. 13 through 16 which specifically dealt with the defense's theory. (T.E. P.476, Appendix A. P.11-14)

Despite the defense's requested instructions and the defense calling this to the court's attention after it instructed the jury (T.E. P.541), the court refused to instruct on the defendant's theory of the case.

Any defense with the slightest evidentiary support must be submitted to the jury and the defendant is entitled to an instruction

on such defense theory. United States v. Garner, 529 F.2d 962 at 970 (6th Circuit 1976) and United States v. Lehman, 468 F.2d 93 at 108 (7th Circuit 1972), cert. denied 409 U.S. 967, 93 S. Ct. 273, 34 L. Ed.2d 232. See also United States v. Swallow, 511 F.2d 514 at 523 (10th Circuit 1975).

In this case there was substantial testimony to the effect that erroneous entries were being made on time and attendance records as well as evidence from which the jury could have concluded that the chief prosecuting witness, Judge Roberts, did indeed have knowledge of such erroneous entries. (T.E. P. 267,268)

Mrs. Heady submits that she was entitled to instructions on her defense theory and that the court's failure to give such instructions was a denial of due process of law.

IV. Whether Petitioner was denied due process of law where Trial Court allowed improper prosecution argument.

In his closing argument the prosecutor made several improper arguments to the jury. These were during his rebuttal argument and at a time when the defendant would not have the opportunity to correct or rebut any misimpressions that he may have made.

The most notable of these was (T.E. P. 529,530) when he stated:

> "What we are doing here, ladies and gentlemen, preserves the condition and belief in government in its activities, in the honesty of our associates and the safety of our conditions in the equality of all people before the law, which the country depends on. If we can't have and rely on honest people operating our programs, what good are the programs, and it's people like this defendant who are the ruination of these programs and pervert these programs . . ." " . . . But you, ladies and gentlemen of the jury, you here are the government because Congress can pass all the laws and let all the judgments and all the FBI agents and all the prosecutors in this country, . . . (T.E. 531) and here you are, making and enforcing the law. And I would ask you, ladies and gentlemen, . . . return with a fair and impartial verdict for the defendant and for the United States and the citizens of this great country. I would ask you please to return a verdict of guilty."

These statements were designed to make the jury believe that it was an integral part

of the law enforcement procedure and that only by its cooperative efforts could our laws be enforced and our standard of life in America maintained.

In Berger v. U.S., 295 U.S. 78, 79 L.Ed. 1314, at 1321 the court commented on the role of the District Attorney:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty, whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods, calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the present case the arguments of the District Attorney, calculated to lead the jury to believe that our standard of life in America cannot be maintained without their help in the law enforcement procedure

was entirely improper in that it was unrelated to the facts of the case and was designed to impart upon the jury the unjust belief that it would be a violation of their duty as jurors to bring back a verdict of acquittal.

Argument to the jury that only a conviction of the defendant would maintain our standard of life in America was improper, was a clear violation of the prosecuting attorney's obligations, and was a denial of fundamental due process.

We admit that the prosecutor may appeal to the jury to perform their duty in enforcing the law, but he may not indulge in arguments calculated to arouse in the jury a fear of public disproval, or otherwise seek to coerce them in a verdict of conviction. Henderson v. United States, (1955, 6th Circuit) 218 F.2d 14, 50 ALR2d 754, Cert. denied 349 U.S. 920, 99 L.Ed. 1253, 75 S.Ct. 660 Reh. denied 349 U.S. 969, 99 L.#d. 1290, 75 S. Ct. 879.

V. Whether Petitioner was denied due process of law where Trial Court refused to permit Petitioner to Voir Dire jury.

Mrs. Heady requested that the defendant be permitted to Voir Dire the jury. This was overruled by the court (T.E. P.5). Admittedly the court did permit the defendant to file her request for Voir Dire and many of these questions were asked by the court. However, the prejudice is that in denying the defendant the opportunity to individually and personally question the jurors the court impaired the defendant's right of pre-emptory challenges.

The "voir dire in American trials tend to be extensive and probing, operating as a predicate for the exercise of pre-emptories." Swain v. Alabama, 380 U.S. 202, 218, L.Ed 2d 759 at 771.

"Indeed the very availability of pre-emptories allows counsel to ascertain the possibility of bias through probing questions on the Voir Dire." Swain, Supra, 380 U.S.

at 219, 13 L. Ed.2d 772.

When as in the present case, the court conducts a superficial and cursory voir dire and denies the defendant the opportunity to uncover bias through probing questions, then the defendant's right to an effective use of pre-emptories has been impaired.

The denial or impairment of the right of pre-emptory challenge is reversible error even without a showing of prejudice. See Swain, Supra, 380 U.S. 319 13 L. Ed.2d 772, Supra, quoting Lewis v. United States, 146 U.S. 370, 36 L. Ed. 104, 13 S. Ct. 136.

We submit the Trial Court committed reversible error in refusing to permit the defendant to voir dire the jury and in the process denied her right to a fair and impartial jury which is the very foundation of due process of law.

CONCLUSION

For these reasons it is respectfully submitted that a writ of certiorari should issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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A P P E N D I X A

NO. 79-5250

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v. O R D E R

ANN FLAHIFF HEADY

Defendant-Appellant

_____/

BEFORE: LIVELY, KEITH and BROWN, Circuit Judges.

The defendant appeals from her jury conviction for violating 18 U.S.C.§1001. Specifically the defendant was charged with falsifying CETA time and attendance reports in which her daughter was shown as a full-time CETA employee at a time when she was actually a full-time student at a university away from home. The daughter testified that she never worked more than four hours a week.

The defendant admitted making the entries, but contended that this was the practice of her office and that she did so at the direction of her employer, the county judge.

Conviction came at a second trial.

at the first trial the jury acquitted the defendant of a count in the indictment in which she was charged with willfully misapplying and fraudulently obtaining CETA funds in violation of 18 U.S.C. §665. The jury was unable to reach a verdict on the second count, the violation of 18 U.C.S. §1001. At the second trial, the only charge was the making of fictitious and fraudulent records and the defendant argues that she was exposed to double jeopardy by being required to defend against the charge at the second trial. She also claims that there is collateral estoppel since the two charges were so closely related. Upon consideration the court concludes that there were different elements involved in the two charges in that a conviction under the charge of misapplication would have required proof of a fact which was not required for conviction on the charge of making false and fictitious representations. Blockburger v. United States, 284 U.S. 299 (1932).

The defendant also contends that the

district court erred in limiting cross-examination of a key prosecution witness, in refusing to give tendered instruction and in refusing to permit counsel for the defendant to conduct a voir dire of the jury. She also argues that the prosecutor was guilty of misconduct in his rebuttal argument. The court has considered all of these contentions in light of the record and concludes that there were no prejudicial errors during the trial of this case which require reversal.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Filed May 7, 1980

John P. Hahman, Clerk

NO. 79-5250

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v. O R D E R

ANN FLAHIFF HEADY

Defendant-Appellant

/

BEFORE: LIVELY, KEITH and BROWN, Circuit Judges.

Upon receipt and consideration of the petition for rehearing filed herein by the defendant-appellant, the court concludes that the issues raised therein were fully considered upon the submission and decision of this case.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Filed May 29, 1980

John P. Hehman, Clerk

UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

UNITED STATES OF AMERICA vs.

DEFENDANT ANN FLAHIFF HEADY

DOCKET NO. CR 78-00199-01-L

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government Mr. C. Fred Partin, the defendant appeared in person on this date - May 31, 1979.

COUNSEL _____WITHOUT COUNSEL
x WITH COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
Mr. John Douglas Hubbard (employed)

PLEA NOT GUILTY 12/7/78

FINDING & JUDGMENT - There being a verdict of GUILTY as to Count 1 of the Indictment, by a Jury after trial held May 29, 30, and 31, 1979. Defendant has been convicted as charged of the offense of make false statements in matter within jurisdiction of U. S. Department of Labor (CETA) in violation of Title 18, U.S. Code, Section 1001 as charged in Count 1 of the Indictment. Presentence Report was furnished by the probation Office and read by the Court.

SENTENCE OR PROBATION ORDER - The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS as to Count 1 of the Indictment.

Believing it to be in the best interest of the United States and the defendant, IT IS FURTHER ORDERED that the defendant serve the first SIX MONTHS in a jail-type institution. The balance of the imprisonment portion of the sentence is suspended and the defendant is placed on probation in regard thereto for a period of FIVE YEARS, said probation to begin upon release from custody.

A special condition of probation is that the defendant make restitution in the amount of $4,756.42 payable to the United States District Court Clerk within the first 54 months of probation.

The defendant is to report to the institution as designated by the United States Marshal to begin service of sentence.

IT IS FURTHER ORDERED that the defendant continue under the terms and conditions of her present bond pending all further proceedings, including appeal.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions or probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ Charles M. Allen
U. S. District Judge

Date May 31, 1979
ENTERED June 5, 1979

Amendment 5

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 665

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, by threat of procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a grant or contract of assistance under the Comprehensive Employment and Training Act of 1973, induces any person to give up any money or thing of any value to any person (includ-

ing such grantee agency) shall be fined not more than $1,000, or imprisoned not more than one year, or both.

DEFENDANT'S REQUESTED INSTRUCTION NO. 13

Evidence has been introduced showing that the defendant made or caused to be made the entries relating to the CETA Time and Attendance Reports. The defendant asserts she was acting in a clerical capacity and that she made such entries under the instructions of her supervisor, Judge Executive Roberts. If you believe that Roberts did instruct the defendant to make such entries and that the defendant was following the instructions of her supervisor in making such entries, then you must find her not guilty.

DEFENDANT'S REQUESTED INSTRUCTION NO. 14

You are instructed that Judge Roberts had the responsibility for the control and operation of the CETA program in Nelson County. It does not constitute any excuse for his behavior his claim that he never read anything that he signed in regard to the program.

If you believe from the evidence that Mrs. Heady prepared the time and attendance records in accordance with the manner in which she had been instructed to do so by the Judge then you shall find the defendant not guilty.

DEFENDANT'S REQUESTED INSTRUCTION NO. 15

If you believe from the evidence that Judge Roberts authorized the employment of Rhonda Heady and in so doing stated that Rhonda could do the work or that her mother, the defendant, could do the work then you shall find the defendant not guilty.

DEFENDANT'S REQUESTED INSTRUCTION NO. 16

The theory of the defendant's case here is that Ann Heady followed the orders and directions of Judge Roberts in causing to be employed Rhonda Heady and in preparing the time and attendance reports which were filed by Judge Roberts and sent to Frankfort. If you believe from the evidence that Mrs. Heady, in filling out the time and attendance reports pertinent to Rhonda Heady, was following the instructions of Judge Roberts and that she merely acted as his agent in so doing, then you should find the defendant not guilty.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA

v. CR 78-00199-01-L

ANN FLAHIFF HEADY

JUDGMENT OF ACQUITTAL
AND ORDER

This action having come on for trial before a Jury on February 20, 1979, testimony and arguments having been heard, and the Jury having returned to open Court on February 22, 1979, and having announced to the Court that it was hopelessly deadlocked as to the charges contained in Count One of the Indictment and having found the defendant Not Guilty as to Count Two,

IT IS ORDERED and ADJUDGED that a Judgment of Acquittal be and it is hereby entered as to Count Two of the Indictment, and

IT IS FURTHER ORDERED that this matter be continued pending further orders of the Court with the United States to notify the Court within 10 days if it wishes to proceed to

retrial as to Count One, with the defendant to continue under the terms and conditions of her present bond for any further appearances.

February __, 1979

/s/ Charles M. Allen
Charles M. Allen, Chief Judge
United States District Court

Entered February 26, 1979

Supreme Court, U. S.
FILED
SEP. 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-153

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANN FLAHIFF HEADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether double jeopardy or the doctrine of collateral estoppel barred retrial of petitioner following her acquittal on a related charge.

2. Whether the trial court abused its discretion by refusing to permit petitioner to conduct a *voir dire* examination of prospective jurors.

3. Whether the district court erred in refusing to instruct the jury on one of petitioner's defense theories.

4. Whether petitioner was deprived of a fair trial as a result of comments in the prosecutor's closing argument.

5. Whether the district court abused its discretion by restricting the cross-examination of a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1980. A petition for rehearing was denied on May 29, 1980 (Pet. App. 4). The petition for a writ of certiorari was filed on July 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of falsifying time and attendance reports for a Comprehensive Employment and Training Act (CETA) program, in violation of 18 U.S.C. 1001.[1] Petitioner was sentenced to five years' imprisonment, all but six months of which was suspended in favor of five years' probation with the condition that she make restitution in the amount of $4,756.42.

The evidence showed that from August 1, 1977 to April 15, 1978, as a part of her responsibilities as secretary to Judge Charles Roberts of Nelson County, Kentucky, petitioner prepared time and attendance reports for persons employed by CETA programs in Nelson County. Although Judge Roberts served as the program's certifying officer, he delegated responsibility for the daily operation of the CETA program to petitioner and

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[1]This was petitioner's second trial on that charge. Petitioner was originally tried in February 1979 for falsifying CETA reports (Count one) and willfully misapplying and fraudulently obtaining CETA money in violation of 18 U.S.C. 665 (Count two). The first trial resulted in an acquittal on Count two and a hung jury on Count one. Petitioner was retried on Count one on May 1, 1979.

routinely signed all CETA documents she prepared (Tr. 148-152, 215-223). Petitioner mailed the report to the central office for CETA administration in Frankfort, Kentucky. CETA payroll checks were prepared from these reports and mailed back to Nelson County CETA employees (Tr. 54-56).

Rhonda Heady, petitioner's daughter, initially enrolled in the Nelson County CETA program as a part-time typist in February 1975, and was promoted to a full-time typist in July 1976. CETA time and attendance reports showed that she continued to be listed as a full-time typist until April 15, 1978; in fact, after August 1, 1977 she attended an out-of-town university as a full-time student (Tr. 96-97, 100-101, 162-165, 173).

At trial, Rhonda Heady testified that from August 1977 until April 1978 she never worked more than four hours per week and that she never signed time cards purporting to show hours she had worked (Tr. 177, 194-195). Indeed, the evidence showed that petitioner herself signed her daughter's name on the hourly time cards, prepared Rhonda Heady's time and attendance reports, and endorsed and deposited all of the payroll checks (Tr. 192, 219, 354-355). Petitioner admitted the time and attendance sheets were inaccurate but contended she was merely following Judge Roberts' orders (Tr. 353, 360).

ARGUMENT

1. Petitioner contends (Pet. 8-11) that principles of collateral estoppel and double jeopardy bar a subsequent prosecution for falsifying CETA reports after her acquittal on charges of misapplication of CETA funds. Petitioner's arguments are without merit.

The Double Jeopardy Clause prohibits successive prosecutions for the same offense. See *Illinois* v. *Vitale*, No. 78-1845 (June 19, 1980), slip op. 5. Here, petitioner was charged with two distinct offenses in the original prosecution—misapplication of CETA funds and making false statements to a federal agency. These are separate offenses, for each requires proof of at least one element that the other does not: the misapplication offense requires proof of actual misapplication, but does not require proof that any false statement was made in the course of the offense; the false statement offense requires proof that a false statement was made to a federal agency, but it does not require proof that the false statement was part of a misapplication scheme. See Pet. App. 2. Thus, under the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the offenses were separate and could have been charged in two different prosecutions without offending the Double Jeopardy Clause. Moreover, the two charges against petitioner were originally tried together. It was only because the jury was unable to reach a verdict as to the false statement charge that it had to be retried in a separate proceeding.

Nor does the doctrine of collateral estoppel bar a retrial on the false statements charge after the jury failed to reach a verdict on that charge. The collateral estoppel doctrine provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). Here, the first jury could not have resolved the facts underlying the false statements charge favorably to

petitioner—if it had, it would have acquitted her on that charge rather than failing to reach a verdict.[2]

2. Petitioner next contends (Pet. 11-14) that the district court abused its discretion in refusing to permit her to cross-examine her employer, Judge Roberts, concerning his involvement in unrelated litigation. Petitioner argues that an inquiry into the judge's prior lawsuits would show that he was "beset on all sides by trouble" and would not therefore "trust[] anyone" (Pet. 12). This, petitioner argues, would impeach his testimony that he trusted petitioner to fill out the time and attendance reports correctly. Petitioner's argument is insubstantial.

A trial judge in the federal system has broad discretion to control the scope of cross-examination. *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976); See also Fed. R. Evid. 611(a). Rule 608(b) of the Federal Rules of Evidence permits an inquiry on cross-examination into specific instances of a witness's past conduct when probative of his character for truthfulness or untruthfulness. The trial court in petitioner's case properly refused to allow petitioner to inquire into Judge Roberts' litigation with other individuals, however, since evidence that the judge was a party to other court actions would

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[2]Collateral estoppel applies only if the first jury necessarily resolved the particular fact in issue in the defendant's favor. *United States* v. *Venable*, 585 F. 2d 71, 78 (3d Cir. 1978); *United States* v. *Ballard*, 586 F. 2d 1060, 1064-1066 (5th Cir. 1978). Petitioner's acquittal on the misapplication charge did not in any way foreclose her subsequent conviction for making false statements. An acquittal on the misapplication charge did not mean that the jury did not believe that petitioner falsified the CETA records. For example, the first jury may well have concluded that petitioner falsified the reports but that her daughter misapplied the funds. Accordingly, the government was not collaterally estopped from retrying petitioner on the falsification charge.

have had no probative bearing on the judge's credibility as a witness. The fact that the judge filed suits against other persons would not in any way impeach his testimony that he trusted petitioner to do her job correctly.[3]

3. Petitioner next contends (Pet. 14-17) that the trial court erred in refusing to instruct the jury on one of her defense theories. In brief, petitioner claimed she prepared the time and attendance reports exactly as Judge Roberts instructed her to do and that she was unaware that her actions constituted a crime (see Tr. 478-481). Accordingly, petitioner submitted proposed instructions (Pet. App. 11-14) embodying an "agency" theory of defense. In effect, petitioner's proposed instructions would have charged the jury that if they found that petitioner acted as an agent of Judge Roberts in following his instructions, they must find her innocent. The trial judge correctly refused to give the proposed instructions because they were legally unfounded (see Tr. 541).

Unlike the defense theory in the cases upon which petitioner relies,[4] petitioner's defense theory has no basis in the law. Complying with orders of an employer is no defense when the defendant has the intent to commit the crime. To the extent petitioner contended she did not have the requisite specific intent, the trial judge properly instructed the jury on this element of the offense (see Tr. 534, 536).

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[3]In fact, petitioner's proffered evidence was general character evidence, prohibited by Rule 404(a), Fed. R. Evid.

[4]*United States* v. *Garner*, 529 F. 2d 962 (6th Cir. 1976) (duress defense); *United States* v. *Lehman*, 468 F. 2d 93 (7th Cir. 1972) (instruction that income tax law does not require all of one's receipts to be deposited in a bank account); *United States* v. *Swallow*, 511 F. 2d 514 (10th Cir. 1975) (instruction that money drawn from corporate accounts was not income if it was in repayment of loans made to the corporation).

4. Petitioner also argues (Pet. 17-20) that the trial court erred in not declaring a mistrial on the ground that the prosecutor's closing argument was improper and inflammatory, and was calculated to convince the jury that a conviction was necessary to maintain their standard of life.

In closing argument to the jury, the prosecutor stated (Tr. 529-531):

> What we are doing here, ladies and gentlemen, preserves the condition and belief in government in its activities, in the honesty of our associates and the safety of our conditions and the equality of all people before the law, which the country depends on. If we can't have and rely on honest people operating our programs, what good are the programs, and it's people like this defendant who are the ruination of these programs and pervert the programs.
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> * * * * *
>
> * * * you, ladies and gentlemen of the jury, you here are the government because the Congress can pass all the laws and let all the judgments and all the FBI agents and all the prosecutors in the country, but fortunately we live under the greatest system of law ever devised by man, because you are the government, and here you are making and enforcing the law. And I would ask you, ladies and gentlemen, to consider all the evidence, consider this defendant and the evidence as applied to her, and consider the instructions of the Court and return with a fair and impartial verdict for the defendant and for the United States and the citizens of this great country. I would ask you please to return with a verdict of guilty. Thank you.

Counsel's closing argument, while perhaps excessively rhetorical, certainly was not so improper as to require a mistrial. See *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 645 (1974); *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946). A prosecutor's appeal to the jury to enforce the laws to ensure the honest administration of government programs does not deprive a defendant of a fair trial. See *United States* v. *Shirley,* 435 F. 2d 1076, 1079 (7th Cir. 1970) (prosecutorial reference to increasing number of cars being stolen in a prosecution for interstate transportation of stolen motor vehicles); *United States* v. *Stead,* 422 F. 2d 183, 184 (8th Cir.), cert. denied, 397 U.S. 1080 (1970) (prosecutorial admonition to the jury to rid themselves of burglars for the good of the community); *United States* v. *Lewis,* 547 F. 2d 1030, 1036-1037 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977) (prosecutorial appeal that the jury was the public's last shield). In this case, moreover, the prosecutor's remarks show that he was emphasizing not just that the jury should convict, but rather that it assure that justice be done by fulfilling its duty to examine all the evidence and render "a fair and impartial verdict."

5. Petitioner finally claims (Pet. 21-22) that the district judge erred by conducting the *voir dire* himself and refusing to permit petitioner to question the jury.

The short answer to petitioner's argument is that Fed. R. Crim. P. 24(a) permits the court to conduct the examination of prospective jurors, so long as the court permits the parties to submit additional questions to be propounded. In this case, the trial judge followed this procedure and permitted petitioner to submit additional questions in chambers and at the bench (Tr. 5-6). Accordingly, petitioner has no cause for complaint. See

United States v. *Conroy*, 589 F. 2d 1258, 1271 (5th Cir. 1979); *United States* v. *Wertis*, 505 F. 2d 683, 684 (5th Cir. 1974), cert. denied, 422 U.S. 1045 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

DOJ-1980-09